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AD HOC COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT

COMMENTS RECEIVED PURSUANT TO PARAGRAPH 4 OF GENERAL ASSEMBLY RESOLUTION 49/53 ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Report of the Secretary-General

Addendum

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A. BARBADOS

[19 May 1995]

[Original: English]

Article 21

If it is intended that, in a case other than genocide, a complaint can be brought only by a State that has the custody of the suspect or by the State on the territory of which the act or omission in question occurred, then the jurisdiction of the Court would seem to be very limited. This would be particularly so in the case of crimes of international concern against aircraft and passengers, such as the unlawful seizure of aircraft for the purposes of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, and the crimes defined by article I of the Montreal Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation of 1971.

Article 23

It would seem unsatisfactory that a complaint of or directly related to an act of aggression may not be brought "unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint". If indeed the Security Council has "determined" the matter, the question arises as to what is left for the Court to do.

Article 26

Constitutional implications would be involved in the first three paragraphs. It is suggested that these provisions be elaborated so as to address how these powers would be exercised.

These same considerations would arise in article 28 and article 30, paragraph 5.

Article 45

Paragraph 5 seems to preclude dissenting or minority opinions and separate or different reasons. It is not clear what are the reasons for this, and not certain that it is desirable.

Article 60

It is suggested that eligibility for pardon, parole and commutation of sentences should be determined by the substantive laws of the Court, rather than by the laws of the State of imprisonment.

B. TRINIDAD AND TOBAGO

[24 April and 27 June 1995]

[Original: English]

Article 4. Status and legal capacity

Paragraph 2

In order for the International Criminal Court to "enjoy in the territory" of Trinidad and Tobago "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes", legislation would have to be enacted as the International Criminal Court introduces special offences such as "the crime of aggression" and "crimes established under or pursuant to the treaty provision listed in the annex, which, having regard to the conduct alleged, constitute exceptionally, serious crimes of international concern". Further, legislation requiring a special parliamentary majority may be required as the operations of such a court in Trinidad and Tobago will involve a deviation from present constitutional arrangements that govern the appointment of judicial officers.

Article 6. Qualification and election of judges

Paragraph 1

The paragraph outlines the qualifications required for election as judges. The qualities required, inter alia, are to be found in paragraphs 1 (a) and 1 (b), namely, criminal trial experience and recognized competence in international law. Nevertheless, paragraph 2, in referring to nominations for election, mentions persons who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b). It seems that, in paragraph 1, the requirement is conjunctive but, in paragraph 2, disjunctive. The confusion is continued in paragraphs 3 and 8. This may be remedied by inserting the word "or" immediately before paragraph 1 (b).

Article 8. The Presidency

What is the deciding factor in determining which of the Vice-Presidents and alternates will be the one to act? Is it seniority? It is submitted that, immediately after the word "disqualified" in paragraph 2, the following phrase should be inserted: "The second Vice-President may act if the first Vice-President is unavailable."

Article 12. The Procuracy

Paragraph 2

Can the deputy prosecutors be of the same nationality? This may be clarified by stating "the Prosecutor and each Deputy Prosecutor shall be of different nationalities".

Article 16. Privileges and immunities

Is it intended that the immunity of a judge, prosecutor or registrar cannot be revoked? If not, who can revoke such? Situations may arise where revocation of the immunity of a judge, prosecutor or registrar may be appropriate. Consideration should be given to having the President of the Court empowered to do so.

Article 20. Crimes within the jurisdiction of the Court

Crime should be defined (see art. 39):

(a) The "Crime of genocide" is a crime in this jurisdiction (Chap. 11:20 of the Laws of Trinidad and Tobago) and arises from the 1948 Genocide Convention;

(b) The following crimes within the jurisdiction of the Court need some degree of definition for the avoidance of doubt:

(i) "Crime of aggression";

(ii) "Serious violations of the laws and customs applicable in armed conflict";

(iii) "Crimes against humanity".

The above-mentioned crimes may be seen as crimes under customary international law in some jurisdictions and whether they form part of the law of Trinidad and Tobago is debatable. In English law, only that part of customary international law that is considered by the English Courts as incorporated into English law will be recognized as having legal effect (see Foreign Relations Law Halsbury Laws of England, 4th ed., vol. 18). Those crimes within the jurisdiction of the Court that arise from customary international law may have to be legislated for in order to ensure that they are offences in the Trinidad and Tobago jurisdiction;

(c) In respect of "crimes, established under or pursuant to the treaty provisions listed in the annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern", Trinidad and Tobago is a party to a number of the treaties listed in respect of which breaches would give the Court jurisdiction.

Article 26. Investigation of alleged crimes

Paragraph 6 (b)

The provision regarding not being compelled to testify seems unclear.

Article 27. Commencement of prosecution

Paragraph 3

The meaning is unclear when read together with paragraph 2 (a) and (b). It is submitted that the words "not to confirm" in paragraph 2 should be replaced by the word "quash".

Article 28. Arrest

Paragraph 1 (a)

What is "the jurisdiction of the Court" as stated therein? This needs to be carefully described.

Article 29. Pretrial detention or release

Paragraph 1

Exactly what does "rights of the accused" include? For example, does it include the legality of the arrest?

Article 35. Issues of admissibility

"Interested State" has not been defined in the draft and there should be a clear description to avoid uncertainty.

Article 37. Trial in the presence of the accused

Paragraph 4

Would there be a legal representation for the absent accused?

Articles 26, paragraph 6 (b), 29, 37, 39, 40 and 42. Rights of the accused

The above-mentioned articles are some of the provisions that highlight the rights of the accused before the International Criminal Court. They are of a sufficiently high standard so that a citizen of Trinidad and Tobago brought before the International Criminal Court would enjoy protection similar to that

offered by the Constitution and laws of Trinidad and Tobago, for example, right to silence (art. 26 (6) (a) (i)); assistance of counsel (art. 26 (6) (c) (ii)); right against compulsion to testify (art. 26 (6) (b)); right to an interpreter (art. 26 (c)); right to be brought promptly before a judicial officer (art. 29 (1)); right to be present during a trial (art. 37 (1)); no guilt without the act or omission being constituted as a crime under international law (art. 39 (a)); presumption of innocence (art. 40); and minimum guarantee for a fair and public hearing (art. 41).

Article 44. Evidence

Paragraph 1

What is the nature of the undertaking? It is submitted that the words "should take the oath or affirm" be substituted for the words "give an undertaking".

Paragraph 5

Illegally obtained evidence is admissible in some jurisdictions. What is to be regarded as a serious violation?

Article 45. Quorum and judgement

Paragraph 3

What is to be regarded as sufficient time? There should be a specified time.

Article 47. Applicable penalties

Paragraph 3 (c)

Should it not be apart from the United Nations? Is it an agency? It is submitted that the proposals contained in subparagraph (c) should be omitted.

Article 49. Proceedings on appeal

There should be a time specified within which an appeal can be filed or lodged.

Article 50. Revision

Paragraph 1

The words "to the applicant" should be deleted. Should the prosecution be involved in this application?

It is submitted that the words "the conviction" at the end of paragraph 1 should be deleted and replaced by the words "determining guilt or innocence".

Paragraph 2

The words "Prosecutor" and "convicted person" should be interchanged and the words "or rejected" be added after the word "accepted". The paragraph would thus read: "The Presidency shall request the convicted person or the Prosecutor, as the case may be, to present written observations on whether the application should be accepted or rejected."

Annex*

PARLIAMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO

Parliamentarians for Global Action

PARLIAMENTARY DECLARATION DATED 7 MARCH 1995 IN SUPPORT OF AN INTERNATIONAL CRIMINAL COURT

Significant progress has been made in recent years toward the goal of an international criminal jurisdiction which has eluded statesmen and eminent jurists for over a hundred years. The need for mechanisms to try persons accused of the most serious crimes in international law has long been established and has now been underlined by the decision of the Security Council to institute ad hoc tribunals for the trial of persons accused of atrocities committed in the former Yugoslavia and Rwanda half a century after the International Military Tribunals at Nürnberg and Tokyo.

For the second time, the first being in 1953, a draft statute for an international criminal court has been prepared by the International Law Commission following the mandate of the United Nations General Assembly. The 1953 attempt to establish such a court fell victim to the tensions and conflicts of the cold war, which made cooperation among nations to establish a permanent criminal court impossible.

Times have changed. The collapse of authoritarian regimes and the remarkable proliferation of democratic systems have created a more favourable climate for tackling one of humankind's greatest scourges - crime of international dimensions such as aggression, genocide, crimes against humanity and other serious violations of international law.

Indeed, the need to bring crimes of this magnitude into a permanent justice system is all the more compelling in the new international scenario that is unfolding with ultranationalist and fundamentalist forces, vast destructive power, and sophisticated technological capability in the possession of nations, groups and individuals.

The current window of opportunity for cooperation among the countries of the world should now be fully exploited, particularly during the fiftieth anniversary of Nürnberg.

It must not be assumed that fledgling democracies will easily survive. Many, even the more established ones, face serious challenges not the least among them being a rise in organized criminal activity, the corruption of law

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* The following declaration, with 184 signatures, was attached by Trinidad and Tobago as an annex to its comments on the articles of the draft statute. The signature pages are available for consultation in the Secretariat, room S-3450A.

enforcement agencies and subversion of justice systems and of the whole apparatus of Governments.

Populations, particularly in smaller countries, are sometimes ridden with fear of criminal gangs and even of high public officials who have put themselves beyond the reach of the law. This fear erodes confidence in law enforcement and the judicial process and leads to the collapse of the rule of law, which is an essential pillar of the democratic system.

Agreement among nations to cooperate in the campaign against criminal activity concretized in an international criminal court would not only provide a framework for collaboration in the fight against crime at the international level. It would also send an important message to elements in national jurisdictions combating crime: they have available to them, if they so desire, not only moral support but material assistance in numerous ways - including another avenue of prosecution - from powerful allies in the international community. Such multilateral reinforcement on a global scale can have decisive results within national jurisdictions, without the risk of external intervention or interference. This would provide powerful support for the rule of law in democratic systems and for the preservation and advancement of democratic structures of government globally.

In the light of these considerations, we parliamentarians request that no effort be spared by your Government in taking measures to ensure that deliberations on the establishment of an international criminal court proceed toward the convening of a diplomatic conference. Further, we wish to convey to members of the Ad Hoc Committee the view that the campaign to create a permanent court has indeed reached a historic moment; we urge that the Committee seize this moment and move decisively towards a new pillar of global security.